Supreme Court, U.S.
FILED
FEB 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-839

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ANDREW L. ARRUZA, CAPTAIN
CHAPLAIN'S CORPS, UNITED STATES ARMY,
056-32-5107,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Military Appeals

---

REPLY BRIEF FOR THE PETITIONER

HOMER A. WALKUP
2501 Ridge Road Drive
Alexandria, Virginia 22302
(703) 836-8281
Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT Responding to Statement in Brief in Opposition	1
SUMMARIZED QUESTIONS PRESENTED *IN THE PETITION*	4
I. Is Supreme Court review on certiorari limited to issues as to which the Court of Military Appeals has granted a petition for review?	4
II. Does the Fifth Amendment require confidential "probable cause" investigation precedent to preferring capital or otherwise infamous charges against a commissioned officer?	4
III. Was petitioner unconstitutionally denied confrontation with the child witness whose extrajudicial narration provided the sole basis for his prosecution?	5
IV. Child psychiatrist permitted to testify over objection as to his personal belief in the guilt of the petitioner	5
V. Disregard of statutory prohibition of sentence to dismissal	5
VI. Testimony of social service worker as to "typical profile" of child sexual abuser	7
VII. Review by Court of Military Appeals of whether a conviction is supported by substantial evidence and is not contrary to the manifest weight of the evidence	7
VIII. Supervisory responsibility of the Court of Military Appeals with respect to the military justice system	8
CONCLUSION	9

TABLE OF AUTHORITIES

Cases Page

Coy v. *Iowa*, —— U.S. ——, 101 LEd2d 857, 108 S.Ct. 2798, 56 U.S.L.W. 4931 (June 29, 1988).. 3
Navy-Marine Court of Military Review v. *Carlucci*, 26 M.J. 328 (CMA July 22, 1988) 8
United States v. *Billig*, 26 M.J. 744 (USNMCR, Apr. 13, 1988) 8

Constitutional and Statutory Provisions

U.S. Constitution, Amendment V 4, 5, 6, 7
U.S. Constitution, Amendment VI 4, 5
Article 50, Uniform Code of Military Justice (10 USC § 850) 4, 6, 8
Article 66(c), Uniform Code of Military Justice (10 USC § 866(c)) 2, 8, 9
Article 67(d), Uniform Code of Military Justice (10 USC § 867(d)) 2, 3-4, 7, 8, 9
Article 67(h)(1), Uniform Code of Military Justice (10 USC § 867(h)(1)) 4, 8-9
28 USC § 1259 ..... 4, 8-9
Military Rules of Evidence 804(d)(1) 6

Regulations

¶ 126a., page 207, Manual for Courts-Martial, United States (1951) ..... 6, Pet. Appx. 30a

REPLY BRIEF FOR THE PETITIONER

The petition of Andrew L. Arruza for a writ of certiorari was filed November 21, 1988, with copies being served upon the Solicitor General on the same date. Printed copies of the brief in opposition were filed on February 2, 1989, copies thereof being received by mail by counsel for the petitioner on February 3rd.

STATEMENT

1. The brief in opposition challenges the statement of the case as set forth in the petition in one respect only. Although in error in denying any support in the record for a defense theory, the brief in opposition raises new factual and inferential considerations which merit discussion in the interests of maximally informing the Court.

2. The brief in opposition proceeds upon the assumption that refusal of the child witness to testify at the court-martial trial as to molestation of her by the petitioner was prompted by her being intimidated by the civilian defense counsel through introduction of a woman lawyer at the defense table after Heidi had indicated reluctance to testify when women were in the courtroom. (BO 4) That brief further states (p. 8, n.5) that there is no basis in the record for petitioner's assertion (pet. 13) that Heidi's refusal was motivated by her fear of being exposed as a liar.

3. The issue of Heidi's motivation in refusing to testify is a red herring. Fathoming the mind workings of a just-turned-seven-year-old television-educated child would have required many hours of psychoanalysis by a specially experienced psychiatrist. Unfortunately, from the standpoint of advancing Heidi's welfare, all medical and social services attention given her was directed to the end of making out a case for criminal prosecution of the petitioner, not to evaluation of Heidi's long-standing psychosocial maladjustment. No issue with respect to Heidi's

suspected motivation was raised in briefs or arguments before either the Court of Military Review or the Court of Military Appeals. The Court of Military Review, which has exclusive cognizance of issues of fact, found only that Heidi "became emotionally distraught during her testimony and, notwithstanding extensive efforts . . . to encourage her to testify fully regarding the charged offenses, was psychologically unable to do so." (Pet. appx. 3a)

4. The Court of Military Appeals, which is statutorily restricted to taking "action only with respect to matters of law" (10 USC § 867(d), pet. appx. 34a), surmised out of the blue sky that Heidi had been silenced at the court-martial by the *defense*, "through a combination of trial maneuvers and apparent intimidation," and that court members were influenced by such defense "antics" to conclude that the petitioner was guilty. To the credit of the writer of the opinion, he recognized that another possible inference was that Heidi was unable to perpetrate the lie when confronted with the truth (pet. appx 3a and n. 1).

5. As to both the pejoratively termed "antics" of trial defense counsel, and the opposition brief writer's declaration that nothing in the record supports petitioner's contention that Heidi's refusal to testify was motivated by her fear of being exposed as a liar, page 221 of the trial record reveals that at the very outset of the prosecution substantive examination in chief of Heidi, she indicated nonresponsiveness concerning such routine questions as whether she had eaten meals in petitioner's apartment and what was served. The sole action of the civilian defense counsel was to suggest that the trial counsel slow down and give Heidi a chance to answer the trial counsel's questions. To this the Military Judge responded, "Good idea." After head nodding responses to two more questions, the trial counsel asked if Heidi were "scared." Without having been given any provocation, Heidi stated

that the reason for her refusal to answer was because "He" (pointing to the civilian defense counsel) "will say I'm lying," and broke into tears. A recess was ordered for seven minutes, after which Heidi returned to the stand and resumed testifying. Thereafter she began equivocating and stipulating conditions under which she might testify as to the conduct of the petitioner, one of such conditions being if women were excluded from the court room. Trial defense counsel did thereafter have a woman lawyer appear at the counsel table as a member of the defense team. The trial counsel objected; both counsel argued the matter; and the Military Judge overruled the objection. The assessment of the Military Judge, present at the time and place, is certainly superior to any made *aliunde* 4-5 years later. Concerning petitioner's inference that Heidi's reluctance to testify was due to fear of being exposed as a liar, the testimony of Heidi's day care custodian should be noted. That woman, who was the mother of five children of her own, testified (R. 521) that she considered Heidi to be very untruthful, and (R. 528) that when Heidi was confronted with a lie, she would not recant, but would become emotional and refuse to talk.

6. *Coy* v. *Iowa*, —— U.S. ——, 101 LEd2d 857, was handed down by this Court June 29, 1988, less than three weeks before the Court of Military Appeals decision of the case of petitioner. Even the dissenting Justices in *Coy* recognized that the confrontation rule precludes use of out-of-court statements in lieu of live testimony in child abuse cases. The Court of Military Appeals denied without comment a timely petition for reconsideration of the case of petitioner, inviting their attention to *Coy*. (Pet. appx. 21a-26a) The brief in opposition does not mention *Coy* v. *Iowa*.

7. Certiorari is sought to the end of obtaining a ruling that an eleventh hour surmise of defense counsel misconduct by an appellate court whose jurisdiction is statu-

torily limited to matters of law, may not be asserted as a basis for upholding denial of a constitutionally guaranteed right of confrontation.

SUMMARIZED QUESTIONS PRESENTED *IN THE PETITION*

I. Is Supreme Court review on certiorari limited to issues as to which the Court of Military Appeals has granted a petition for review?

Pet. pp. 10-11; BO n. 12 pp. 12-13, n. 15, p. 17

The brief in opposition indicates doubt as to whether the *question* is subject to review on certiorari. The Court of Military Appeals unquestionably granted a petition for review in petitioner's case, which confers certiorari jurisdiction under 10 USC § 867(h)(1) and 28 USC § 1259. The Supreme Court therefore has power to construe the second sentence of § 867(h)(1).

Petitioner is particularly concerned as to the authority of the Supreme Court to review the issue of sentencing him to dismissal contrary to 10 USC § 850 (Question V., below). It is only by virtue of his having retained private counsel, and paid out-of-pocket the printing costs, that petitioner has been able to ask for certiorari. If granted, he should not be put to the cost of pursuing a separate proceeding to enjoin statutorily prohibited action if he does not prevail upon review of either of the issues as to which the Court of Military Appeals did grant review. Military and civilian bars urgently require guidance on this issue.

II. Does the Fifth Amendment require confidential "probable cause" investigation precedent to preferring capital or otherwise infamous charges against a commissioned officer?

Pet. pp. 11-12; BO pp. 12-14.

The brief in opposition does not address the issue of whether the Fifth Amendment may in some situations

require preliminary investigative procedures additional to those set forth in the Uniform Code of Military Justice.

III. Was petitioner unconstitutionally denied confrontation with the child witness whose extrajudicial narration provided the sole basis for his prosecution?

Pet. 12-14; BO pp. 3-5, 6-11.

Matter newly raised in the brief in opposition is discussed in the Statement, pages 1-4, above.

IV. Child psychiatrist permitted to testify over objection as to his personal belief in the guilt of the petitioner.

Pet. pp. 14-15; BO, 5-7, 11-12

All judges of the Court of Military Appeals agreed as to the impropriety of this questioning, and the Chief Judge dissented on this ground. The conviction was affirmed only on the premises, (a) that the testimony was necessitated by questions of the civilian defense counsel on cross-examination, the answers to which tended to make the members of the court-martial believe that the psychiatrist did not think the child witness truthful, and (b) that the error was "harmless." It is preposterous to term this error harmless, as the dissent of the Chief Judge indicates. Nothing is perceived in the questioning (quoted pet. appx., 13a) which could not have been fully cured by instruction of the court-martial, if in fact there was any error.

Division of the Court of Military Appeals and weakness of the reasoning of the majority justify certiorari as to this issue.

V. Disregard of statutory prohibition of sentence to dismissal.

Pet. pp. 17-18; BO, pp. 15-16.

The brief in opposition misconceives 10 USC § 850. The statute does not apply solely to testimony rendered before a court of inquiry, as Military Rule of Evidence 804(b)(1) makes clear (Pet. appx. 30a). Section 850(b) as set forth on page 28a of the appendix to the petition contains a typographical error. It should read: (b) Such testimony may be read in evidence only by the defense in capital cases *or cases* extending to dismissal of a commissioned officer. The last sentence of MRE 804 (b)(1) makes subject to the limitations of Section 850 (b) any form of prior testimcny that may be introduced, specifically including a pre-trial investigation. This must be so, as otherwise the limitations of 850(b) could be evaded by the device of conducting another investigative proceeding concurrent with a court of inquiry, calling the same witnesses and asking the same questions. The legislative intent for over two hundred years has been to prohibit dismissal of officers upon anything other than live testimony rendered in open court, no matter how unpopular the officer or how heinous the offenses alleged in the prior recorded testimony.

The wording of § 850 is deceptive. It is doing two things, i.e., absolutely prohibiting *introduction* of recorded testimony to support capital charges against any servicemember, regardless of status; but permitting introduction in noncapital cases, subject to the condition that if such evidence is introduced, no sentence of dismissal may be imposed upon an officer if the officer's conviction is based upon such evidence. This was clearly stipulated in the regulations implementing § 850 in 1951, and the Congress has at no time amended the statute during the ensuing 38 years. (Pet. appx. 30a)

It should be of particular interest to the Armed Forces to obtain a definitive ruling from the Supreme Court as to the foregoing necessary interpretation of Article 50 (§ 850). It would be material in any new trial of petitioner if his conviction is reversed, and is of vital concern to the petitioner if his conviction is upheld.

VI. Testimony of social service worker as to "typical profiile" of child sexual abuser.

Pet. pp. 18-20; BO, pp. 14-15.

The instruction of the Military Judge (BO p. 13) tended to heighten in the minds of court members the impression that the command was sending them some hidden message in introducing evidence to establish so patent a proposition as that men of good appearance and reputation sometimes commit crimes.

VII. Review by Court of Military Appeals of whether a conviction is supported by substantial evidence and is not contrary to the manifest weight of the evidence.

Pet. pp. 20-22; BO p. 16-17.

Although prohibited from reweighing evidence or reassessing credibility of witnesses, the Court of Military Appeals is not precluded from ruling, contrary to the Court of Military Review, either that a case is or is not supported by substantial evidence, or is or is not contrary to the manifest weight of the evidence—these being universally held to be matters of law. In the case of petitioner there was no in-court testimony establishing a *corpus delicti*, and affirmative evidence of innocence of the accused included his own testimony, the testimony of the mother of the self-asserted child victim, the day care custodian of the child, the child's schoolteachers, the former wife of the petitioner (who is also the mother of his two grown daughters and his adolescent son), and even the former commanding officer of the accused who, upon no basis other than two hearsay investigative reports, and despite the vehement denial of the petitioner on face-to-face confrontation, had improvidently signed and sworn to charges of rape and sodomy, effectively compelling hue and cry investigation and trial of petitioner.

VIII. Supervisory responsibility of the Court of Military Appeals with respect to the military justice system.

Pet. pp. 22-23; no comment in BO.

Navy-Marine Court of Military Review v. *Carlucci*, 26 M.J. 328 (CMA, July 22, 1988) and *United States* v. *Billig*, 26 M.J. 744 (USNMCR, April 13, 1988) are pertinent. In *Carlucci*, the Court of Military Appeals held that it had inherent supervisory authority over the military justice system which enabled it to enjoin the Secretary of Defense from pursuing an investigation into whether the action of the Court of Military Review in reversing the conviction of *Billig* had been procured by bribery. One of the Judges of the Court of Military Appeals was appointed Special Master to consider and report any evidence of bribery, and he later reported receiving no substantial evidence.

In the case of petitioner, the general supervisory power should have been utilized to require the Army Court of Military Review to reconsider the case and render findings based on the evidence as to any specific questions of fact which the Court of Military Appeals considered to be unresolved. The Court of Military Review could at the same time have been directed to make a reasoned ruling on the record on the issue of prohibition of a sentence extending to petitioner's dismissal, rather than cavalierly brushing this issue aside as "nonmeritorious."

All former avenues of executive and legislative review having been closed (pet. pp. 22-23), it becomes incumbent upon the Court of Military Appeals to assume that Courts of Military Review have complied with their statutory charter to "affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record should be approved." (10 USC § 866(c), pet. appx. 33a) It is sub-

mitted that the Congressional intent, in conferring certiorari review power upon the Supreme Court, was to provide a check to insure that the Article I Court of Military Appeals and Courts of Military Review have complied with their authorizing statutes in letter and spirit.

CONCLUSION

The underlying issue presented by the petitioner in this case is one of long standing: Is the trial of members of the Armed Forces upon charged offenses which are not exclusively military in character to be conducted in accordance with generally prevailing federal law, or as a ceremonial means of assuredly eliminating from the service members whom the command no longer considers useful? If court-martial proceedings are to be show trials only, then there is no place in them for professional lawyers, and permitting military members accused to retain private counsel represents a deceptive cruel hoax. Able and conscientious lawyers will not long continue to participate in a system in which they are but Thespians, expected to render an impressive histrionic performance, but also expected gracefully to accept the end result programmed by the command playwright. The Military Justice Act of 1983, in permitting review upon writ of certiorari by the Supreme Court of certain court-martial cases, provided a means of imposing upon the Armed Forces a government of law in military criminal prosecutions, and a means of enabling lawyers in the active military service to function as professionals. Precedents and assurance of their recognition and enforcement are the sole tools of the lawyer's trade. The case of petitioner uniquely presents several issues as to which valuable controlling precedents can be rendered, and it fortunately involves a situation in which the evidence, impartially viewed, preponderates in favor of petitioner's innocence. It is therefore submitted

as being an ideal case in which to grant certiorari for review of all questions presented.

Respectfully submitted,

HOMER A. WALKUP
2501 Ridge Road Drive
Alexandria, Virginia 22302
(703) 836-8281
Counsel for Petitioner